UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TERESA P. JOHNSON, Plaintiff, v. I. MICHAEL HEYMAN, Secretary, Smithsonian Institution, Defendant.	Civil Action No. 98-1860 DAR

MEMORANDUM AND ORDER

INTRODUCTION

Pending for determination by the undersigned United States Magistrate Judge is Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment (Docket No. 11). Plaintiff, an African-American female employed by defendant Smithsonian Institution, sues her employer for violations of Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e, et seq. Plaintiff claims that her employer "discriminated against her on the basis of her sex, race and color, by the creation of a hostile work environment, and by retaliating against her[.]" Complaint (Title VII) for Declaratory, Injunctive and Monetary Relief Arising from Employment Discrimination and Retaliation on the Basis of Sex, Race and Color ("Complaint"), ¶¶ 1-2. Plaintiff's two-count complaint alleges intentional discriminatory and retaliatory denial of career opportunity on the basis of race and sex (Count I), and

intentional discriminatory and retaliatory removal of duties amounting to a demotion on the basis of race and sex (Count II). Complaint, ¶ ¶ 25-28.

BACKGROUND

Plaintiff has been employed by the Smithsonian Institution since 1986 in a number of capacities. Complaint, ¶ 4. In February, 1992, Claudine Brown, the alleged discriminating official, assigned plaintiff to the defendant's Duke Ellington program as a fiscal manager at the GS-11 level. Complaint, ¶ 7. Plaintiff states that her primary responsibility was to "administer all expenditures" by the Duke Ellington program and the National African-American museum project. Complaint, ¶ 6. Plaintiff alleges that she had a good working relationship with Ms. Brown prior to 1992 when Mr. Akbar Ali[1] became employed as a project coordinator for the Duke Ellington Project. Complaint, ¶ 10. Plaintiff claims that prior to 1992, plaintiff had never been disciplined for misconduct and had received "outstanding" or "excellent" performance appraisals. Complaint, ¶ 9. Plaintiff alleges that prior to February, 1992, Ms. Brown assigned her to projects performed by higher level employees with the understanding that she would receive a promotion to the GM-13 level. Complaint, ¶ 10. In February, 1992, Ms. Brown ordered plaintiff to award a contract to Mr. Akbar Ali for him to serve as a project coordinator for the Duke Ellington Project. Complaint, ¶ 8.

Plaintiff asserts that Ms. Brown and Mr. Ali had a personal relationship prior to February, 1992. Complaint, ¶ ¶ 2, 21. Plaintiff asserts that because "Ms. Brown's personal relationship with Mr.

[1] Plaintiff also refers to Mr. Ali as George Herndon. Complaint, ¶ 8.

Ali was a relationship based on their sex, and because Ms. Brown believed that plaintiff's performance of her duties interfered with that relationship, Ms. Brown discriminated against plaintiff." Plaintiff further maintains that such discrimination "amounts to sexual discrimination." Complaint, ¶ 21. Plaintiff also contends that "such discrimination also was racial, because Ms. Brown treated plaintiff, a Black female, differently from whites." Id.

Plaintiff claims that her relationship with Ms. Brown "deteriorated rapidly when plaintiff became aware of improprieties, irregularities and possible violations of the law by Mr. Ali, regarding his handling of financial matters on the Ellington project." Complaint, ¶ 11. Plaintiff identifies at least seven instances of "discriminatory treatment" by Ms. Brown "because of Ms. Brown's personal relationship with Mr. Ali[.]" Complaint, ¶ ¶ 12-18. For example, plaintiff alleges that on March 23, 1992, she told Ms. Brown that Mr. Ali had violated federal regulations by purchasing food for a project workshop with federal funds, and that Ms. Brown allegedly responded by "[holding] plaintiff culpable for [Mr. Ali's] financial irregularity." Complaint, ¶ 12.

Plaintiff further alleges that Ms. Brown "also engaged in retaliatory acts against plaintiff, designed to harass and humiliate her, and to damage plaintiff's credibility with others, so that plaintiff's questions about Mr. Ali's irregularities and improprieties would not be taken seriously by other Smithsonian employees." Complaint, ¶19. Specifically, plaintiff alleges that Ms. Brown directed another supervisor, Ms. Bonds, to conduct an internal audit of plaintiff's financial records; that Ms. Brown refused, without explanation, to "sign off" on plaintiff's "outstanding" performance evaluation which Ms. Bond prepared; and that on June 7, 1992, Ms. Brown failed to promote plaintiff to GS-11,

allegedly "in retaliation of plaintiff's questioning of Mr. Ali about the above irregularities and improprieties." Complaint, ¶ 19.

Plaintiff further alleges that the alleged discrimination and retaliation "created a hostile work environment for plaintiff." Complaint, ¶20. Plaintiff alleges that Ms. Brown became discourteous with her; that Ms. Brown would not address her by name; that Ms. Brown attacked plaintiff's "work product and integrity"; and that some other employees, sensing Ms. Brown's "disapproval," became distant and "discontinued plaintiff's involvement in their projects." Id.

With respect to her claim that Ms. Brown treated her differently from white employees, plaintiff alleges that (1) Ms. Brown made certain that white employees received their promotions timely, but that she was not promoted; (2) Ms. Brown approved performance appraisals and recommendations for awards and promotions from white supervisors, but challenged those same requests if they came from black supervisors; (3) that three white co-workers received their cash awards for their work in 1992, but that she had to wait until 1993; and (4) that a white employee who received an "unsatisfactory" job performance evaluation did not face any adverse job action, and was allowed to "loaf." Complaint, ¶21.

CONTENTIONS OF THE PARTIES

Defendant moves to dismiss plaintiff's Complaint for failure to state a claim upon which relief can be granted, or alternatively, for summary judgment, on the ground that no genuine issue of material fact exists and defendant is entitled to judgment as a matter of law. Specifically, defendant claims that plaintiff has "failed to assert a cognizable claim of discrimination pursuant to Title VII." Memorandum

in Support of Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Defendant's Memorandum") at 12. Defendant asserts that "Title VII does not protect against the type of purported discrimination plaintiff alleges -- differential treatment arising from a supervisor's alleged romantic relationship with a contractor." Defendant's Memorandum at 13 (citations omitted). Defendant maintains that while such treatment may be unfair, it is not violative of Title VII. Defendant further maintains that "plaintiff has not claimed or demonstrated that Ms. Brown treated her differently from any employee--male or female, black or white--who might have voiced opposition to the perceived favoritism received by Mr. Ali." Id.

Defendant maintains that plaintiff similarly has failed to state a claim of hostile work environment, in that she has failed to allege "severe, pervasive harassment based on her gender or race." Defendant's Memorandum at 15 (citations omitted). Defendant characterizes plaintiff's allegations as "isolated incidents," none of which even "remotely involved or even referred to sexually- or racially-based comments or conduct." Defendant's Memorandum at 16.

Finally, defendant maintains that "plaintiff has failed entirely to establish a prima facie case of retaliation." Defendant's Memorandum at 17. Defendant claims that the plaintiff's complaint fails to describe a causal link between the alleged adverse action taken against her and any protected activity. Defendant claims that because plaintiff's complaints concerned only Mr. Ali's alleged fiscal misconduct, such complaints were "in no way related to perceived violations of Title VII[,] [and] therefore, [did] not constitute 'protected activity' under Title VII." Id. In addition, defendant maintains that because plaintiff did not seek EEO counseling until August, 1993, and the alleged retaliation occurred prior to

that time, there is no causal connection between the protected activity and the alleged retaliatory conduct. Defendant's Memorandum at 17-18.

Plaintiff, in her opposition, submits that defendant's motion to dismiss must be treated as a motion for summary judgment because defendant "has submitted extensive written evidence 'outside the pleadings.'" Memorandum of Points and Authorities in Support of Plaintiff's Opposition to: Defendant's Motion to Dismiss, or in the Alternative, Summary Judgment ("Plaintiff's Opposition") (Docket No. 24) at 14. Plaintiff further maintains that she "has provided this Court with sufficient facts to survive a summary judgment challenge." Plaintiff's Opposition at 15. With respect to her claim of discrimination, plaintiff, relying on King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985), states that this Circuit recognizes "Title VII's reach into 'third-party' sex discrimination cases, where such sex discrimination is directed against a third party as a result of a relationship between two (2) other parties." Plaintiff's Opposition at 16-17. Plaintiff submits that her "demotion . . . was done because she was female 'competition' for Ms. Brown and that Ms. Brown desired to neutralize [her] effectiveness on the job." Plaintiff's Opposition at 17. Plaintiff submits that Ms. Brown "did not treat her white subordinates in this same manner." Id.

Next, plaintiff maintains that she need not establish a prima facie case of harassment at this stage, and need show only "that there is a factual dispute concerning the existence of a hostile environment." Plaintiff's Opposition at 18. Plaintiff claims that defendant created a hostile work environment by (1) Ms. Brown's comment to her regarding her "real problem"; and (2) Ms. Brown's

constant criticism of her "by memoranda in an attempt to keep [her] from becoming a female 'competitor' for Mr. Ali." Plaintiff's Opposition at 18-19.

Finally, with respect to her retaliation claim, plaintiff submits that "[t]hroughout the harassment and the discrimination, [she] complained about defendant's treatment." Plaintiff's Opposition at 19-20. She states that her complaints "culminated" in her decision to file an EEO complaint "sometime in June or early July 1992." Plaintiff's Opposition at 20. Plaintiff argues that there is a causal connection between her complaints of harassment and discrimination and the adverse actions about which she complains. Plaintiff's Opposition at 20-21.

Defendant, in its reply, maintains that plaintiff's opposition is untimely, and that in any event, she has failed to "demonstrate any legitimate ground for defeating Defendant's Motion or otherwise raise a genuine dispute regarding any material fact." Defendant's Reply to "Plaintiff's Opposition to: Defendant's Motion to Dismiss, or in the Alternative, Summary Judgment" ("Defendant's Reply") (Docket No. 15) at 1. Defendant observes that plaintiff did not comply with the requirement of Local Rule 7.1(h)[2] that an opposition to a motion for summary judgment

> shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement.

Defendant's Reply at 10. Defendant maintains that plaintiff's "Statement of Material Facts as to Which There is No Dispute" does not satisfy the requirement of the local rule, and that this Court may properly

---

[2] At the time the motion, opposition and reply were filed, the rule was known as Local Rule 108(h), and is so identified by the parties.

deem admitted the facts identified by defendant in its Statement of Material Facts as to Which There is No Genuine Issue. Defendant's Reply at 11-12.

On March 30, 2000, after defendant's motion had been fully briefed, the undersigned entered an Order (Docket No. 22) directing the parties to file supplemental memoranda addressing the applicability of Brown v. Brody, 199 F.3d 446 (D.C. Cir. 1999), to the issues presented. In his Supplemental Memorandum in Support of Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Defendant's Supplemental Memorandum") (Docket No. 23), defendant asserts that "plaintiff has not alleged that she was the subject of any adverse employment action as that term was clarified by the D.C. Circuit in Brown." Defendant's Supplemental Memorandum at 4. Plaintiff, on the other hand, asserts that Brown is not relevant to her claims of "third party sexual harassment" because she has alleged "'hostile work environment' harassment" rather than "'quid pro quo' harassment." Plaintiff's Supplemental Opposition to: Defendant's Motion to Dismiss, or in the Alternative, Summary Judgment ("Plaintiff's Supplemental Opposition") (Docket No. 24) at 3. Plaintiff further asserts that with respect to her claims of disparate treatment and retaliation, to which Brown is applicable, she suffered adverse employment action when "Ms. Brown demoted [her] by removing her from her job as chief financial officer[.]" Plaintiff's Supplemental Opposition at 5. Additionally, "[w]ith respect to the claim of retaliation, plaintiff contends that after she made her informal EEO complaint, defendant Ms. Brown denied her a promotion that was promised for some time[,]" and that "not even a pretextual reason was given by defendant for the denial of plaintiff's promotion." Plaintiff's Supplemental Opposition at 6.

APPLICABLE STANDARDS

A. Motion to Dismiss

A motion to dismiss for failure to state a claim upon which relief can be granted does not test whether the plaintiff will prevail on the merits, but instead, whether the plaintiff has properly stated a claim. Price v. Crestar Sec. Corp., 44 F. Supp.2d 351, 353 (D.D.C. 1999) (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). To prevail, a defendant must show "beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." E.E.O.C. v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); see also Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Atchinson v. D.C., 73 F.3d 418, 421 (D.C. Cir. 1996). In determining whether a plaintiff fails to state a claim, the court may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which judicial notice may be taken. See St. Francis Xavier Parochial Sch., 117 F.3d at 624. Furthermore, the court must accept the plaintiff's factual allegations as true, and draw all reasonable inferences in favor of the plaintiff. Id.; see also Maljack Prods. v. Motion Picture Ass'n, 52 F.3d 373, 375 (D.C. Cir. 1995). However, the court need not accept as true the plaintiff's legal conclusions. See Taylor v. F.D.I.C., 132 F.3d 753, 762 (D.C. Cir. 1997).

B. Summary Judgment

Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); Celotex Corp. v.

Catrett, 477 U.S. 317, 322 (1986); Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995). The burden is upon the non-moving party to demonstrate that there are material facts in dispute. Celotex, 477 U.S. at 324. There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Material facts are in dispute if they are capable of affecting the outcome of the suit under governing law. Id. In considering a motion for summary judgment, all evidence and inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor." Anderson, 477 U.S. at 248; see also Bayer v. United States Dept. of Treasury, 956 F.2d 330, 333 (D.C. Cir. 1992).

In employment discrimination cases, reviewing courts should approach motions for summary judgment with caution because it is difficult for plaintiffs to prove their employer's intent. See Childers v. Slater, 44 F. Supp. 2d 8, 15 (D.D.C. 1999); Johnson v. Digital Equip. Corp., 836 F. Supp. 14, 18 (D.D.C. 1993). Nevertheless, the non-moving party may not rely upon mere allegations as support for its position but must come forth with specific facts and affidavits based upon personal knowledge to show that there is a genuine issue for trial. See Matsushita, 475 U.S. at 587; FED. R. CIV. P. 56(e).

In addition, Local Civil Rule 7.1(h) provides:

> Each motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement. An opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting

> forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement . . . . In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

Local Civil Rule 7.1(h) (emphasis added).

C. Title VII Framework

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the Supreme Court set forth the triparate legal framework for Title VII cases alleging discriminatory treatment. The McDonnell Douglas framework is also applicable to claims of retaliation. See McKenna v. Weinberger, 729 F.2d 783, 790 (D.C. Cir. 1984).

To satisfy the first element of the McDonnell Douglas framework, the plaintiff must prove a prima facie case by a preponderance of the evidence. McDonnell Douglas, 411 U.S. at 802. Generally, to establish a prima facie case of disparate treatment discrimination, a plaintiff must show (1) that she belongs to a protected class; (2) that she suffered an adverse employment action; and (3) that the unfavorable action gives rise to an inference of discrimination. Brown v. Brody, 199 F.3d at 452 (citing McKenna, 729 F.2d at 790). In order to establish a prima facie case of retaliation, a plaintiff must show (1) that she engaged in a statutorily protected activity; (2) that the employer took an adverse personnel action; and (3) that a causal connection existed between the two. Id. at 453 (citing Mitchell v. Baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985); accord, Holbrook v. Reno, 196 F.3d 255, 263 (D.C. Cir. 1999); Webb v. District of Columbia, 864 F. Supp. 175, 185 (D.D.C. 1994).

If a plaintiff succeeds in proving his or her prima facie case, a presumption that the employer unlawfully discriminated against the employer arises, see Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981), and the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802.

Finally, if the defendant successfully carries this burden, then the presumption of discrimination disappears, and the plaintiff "must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were pretext for discrimination." Burdine, 450 U.S. at 253 (citing McDonnell Douglas, 411 U.S. at 804); see also St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993). At all times plaintiff retains the ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the plaintiff. Burdine, 450 U.S. at 253. At this point, plaintiff's ultimate burden of proving intentional discrimination merges with her burden of demonstrating pretext. Burdine, 450 U.S. at 256.

Upon careful consideration of plaintiff's complaint, defendant's motion, the memoranda and supplemental memoranda in support thereof and in opposition thereto and the entire record herein,[3] plaintiff's complaint will be dismissed with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted with respect to her claims of discrimination and retaliation on the basis of sex, and summary judgment pursuant to Rule 56 of the

---

[3] Defendant asserts that because plaintiff failed to include a statement of genuine issues, its statement of material facts as to which there is no genuine issue should be deemed admitted pursuant to Local Civil Rule 7.1(h) and Rule 56(e) of the Federal Rules of Civil Procedure. Defendant's Reply at 10-12. While this court could certainly treat defendant's statement of material facts not in dispute as admitted, see SEC v. Banner Fund Int'l, 211 F.3d 602, 616 (D.C. Cir. 2000), the undersigned finds that the interests of justice would not be served by doing so here.

Federal Rules of Civil Procedure will be granted in favor of the defendant with respect to plaintiff's claims of discrimination and retaliation on the basis of race.

DISCUSSION

A. Discrimination Based on Sex

Plaintiff asserts in her complaint that "Ms. Brown's personal relationship with Mr. Ali was a relationship based on their sex, and because Ms. Brown believed that plaintiff's performance of her duties interfered with that relationship, Ms. Brown discriminated against plaintiff[.]" Complaint, ¶ 21. The undersigned finds that the acts alleged by plaintiff do not state a claim of unlawful discrimination or retaliation on the basis of sex under Title VII.

Favoritism by a supervisor toward a co-worker who is a paramour, spouse or friend does not generally constitute discrimination on the basis of sex in violation of Title VII. See Taken v. Oklahoma Corp. Comm'n, 125 F.3d 1366, 1369 (10th Cir. 1997) (surveying authorities); Becerra v. Dalton, 94 F.3d 145, 149-50 (4th Cir. 1996); DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 307 (2d Cir. 1986); Hennessy v. Penril Datacomm. Networks, Inc., 69 F.3d 1344, 1353-54 (7th Cir.1995). "Title VII's reference to 'sex' means a class delineated by gender, rather than sexual affiliations." Taken, 125 F.3d at 1369; see also Drinkwater v. Union Carbide Corp., 904 F.2d 853, 859-62 (3d Cir. 1990). The rationale for holding that Title VII does not prohibit instances of preferential treatment based upon a relationship, even one of a sexual nature, is that any disadvantage suffered by the non-favored employee is for reasons other than their gender. Hennessy, 69 F.3d at

1353-54 (citing EEOC Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism, EEOC Notice No. 915-048 (January 12, 1990)).

Dismissal of plaintiff's complaint with respect to her claims of discrimination and retaliation on the basis of sex is required because plaintiff has simply "plead [herself] out of court by alleging facts that render success on the merits impossible." Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1116 (D.C. Cir. 2000). The gravamen of plaintiff's claims of discrimination and retaliation on the basis of sex is that Ms. Brown favored Mr. Ali because of their alleged relationship and treated plaintiff unfavorably because she voiced opposition to Ms. Brown's alleged favoritism and to Mr. Ali's allegedly improper conduct. Specifically, plaintiff alleges that she was verbally attacked, denied travel opportunities and relieved of her fiscal management duties by Ms. Brown for reporting alleged improper conduct by Mr. Ali. Indeed, plaintiff repeatedly asserts that the reason for Ms. Brown's conduct was her "personal relationship" with Mr. Ali and her need to cover up the allegedly wrongful conduct identified by plaintiff. Complaint, ¶ 21. Assuming that all of the events plaintiff describes occurred, the facts alleged do not render success on the merits possible, given plaintiff's reliance upon Ms. Brown's alleged favoritism toward a paramour as her theory of discrimination.[4] The fact that her female supervisor's favoritism was directed toward a co-worker who happens to be male could not be the basis of a determination that plaintiff was discriminated against on the basis of her sex. Quite simply, plaintiff has failed to

[4] The undersigned finds that plaintiff's reliance on King v. Palmer, 778 F.2d 878, 880 (D.C. Cir. 1985) is misplaced. The King court did not make any finding that plaintiff had established a prima facie case of discrimination, because the parties had stipulated that the plaintiff's claim, which was predicated upon an alleged sexual relationship between a co-worker and plaintiff's supervisor, constituted a prima facie case.

establish a "causal connection between the gender [Mr. Ali] and the resultant preference or disparity." DeCintio, 807 F.2d at 307

B. Discrimination Based on Race

Plaintiff claims that Ms. Brown discriminated against her on the basis of her race by (1) requiring her to wait until 1993 to get her cash award when three white employees received their awards in 1992; (2) denying travel opportunities; and (3) failing to implement a "promised" promotion. Plaintiff claims that such acts were racially discriminatory because "Ms. Brown treated plaintiff, a Black female differently from whites." Complaint, ¶ 21.

This Circuit has recently held that a plaintiff is not required to set forth the elements of a prima facie case at the initial pleadings stage. Sparrow, 216 F.3d at 1113. The Circuit cited with approval the conclusion that "'[b]ecause racial discrimination in employment is a 'claim upon which relief can be granted,' . . . 'I was turned down for a job because of my race' is all a complaint has to say to survive a motion to dismiss under Rule 12(b)(6)." Sparrow, 216 F.3d at 1115 (citing Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998)).

Here, plaintiff claims that "Ms. Brown discriminated against plaintiff because of her . . . race and color[,]" and that "Ms. Brown, for example, made certain that white employees received promotions timely; plaintiff had an excellent job history, but was not promoted[.]" Complaint, ¶ 21. Because plaintiff's claim is tantamount to "I was turned down for a job because of my race," Sparrow provides that dismissal for failure to state a claim of racial discrimination would be inconsistent with Rule 8 of the Federal Rules of Civil Procedure and Conley. Sparrow, 216 F.3d at 1114. However,

defendant has moved in the alternative for summary judgment. Accordingly, the undersigned will consider plaintiff's race discrimination and retaliation claims in accordance with Rule 56 of the Federal Rules of Civil Procedure.[5]

The discussion of plaintiff's gender discrimination claims also applies to her claims of racial discrimination which are predicated upon Ms. Brown's alleged favoritism toward Mr. Ali. See Autry v. North Carolina Dep't. of Human Resources, 820 F.2d 1384, 1387 (4th Cir.1987) (promotion of friend and political ally is not racial discrimination under Title VII); Balazs v. Liebenthal, 32 F.3d 151, 159 (4th Cir. 1994) ("to hold that favoritism towards friends and relatives is per se violative of Title VII would be, in effect, to rewrite federal law") (citation omitted). Plaintiff does not even assert that she was disadvantaged because of her race, and instead, alleges that she was disadvantaged because of her interference in her supervisor's relationship. Accordingly, the alleged actions of defendant, even if true, do not constitute discrimination in violation of Title VII.

With respect to plaintiff's claims of discrimination on the basis of race which are not predicated upon Ms. Brown's alleged favoritism towards Mr. Ali, see Complaint, ¶ 21, plaintiff has not shown that the discriminatory acts alleged, such as, inter alia, a delay in receiving a cash award, the denial of travel opportunities, or the delay in an allegedly promised promotion, are adverse employment actions. On December 29, 1999, in Brown v. Brody, this Circuit specifically held that "in Title VII cases such as

---

[5] In the instant case, unlike in Sparrow, defendant's motion was filed not as a responsive pleading before any discovery had been taken, but rather, after discovery closed. The undersigned is mindful of the Sparrow court's admonition that "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." 216 F.3d at 1118 (quoting Leatherman v. Tarrant County Narcotice and Intelligence Coordination Unit, 507 U.S. 163, 168-160 (1993)).

Brown's, federal employees like their private counterparts must show that they have suffered an adverse personnel action in order to establish a prima facie case under the McDonnell Douglas framework." 199 F.3d at 455. The Brown court relied upon the requirement discussed in Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998), that a plaintiff show a "tangible employment action" in discrimination cases based on vicarious liability. The Brown court cited the Ellerth holding that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 199 F.3d at 456. The Brown court also considered "'discharge, demotion, or undesirable reassignment' as three examples of the kind of 'tangible employment action' for which an employee may bring a vicarious liability suit against her employer under Title VII." Brown,199 F.3d at 457 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998) and Ellerth, 524 U.S. at 765). The Brown court specifically held that plaintiff's claims regarding an involuntary lateral transfer, a denial of a request for a transfer, a "fully satisfactory" evaluation and a letter of admonishment did not constitute adverse personnel actions. Id. at 455-58.

This Circuit has also held that "no particular type of personnel action is automatically excluded from serving as a basis of a cause of action under Title VII, as long as the plaintiff is aggrieved by the action." Cones v. Shalala, 199 F.3d 512, 521 (D.C Cir. 2000) (internal citations omitted). However, the undersigned finds that plaintiff's claims of racial discrimination with respect to the denial of various "career opportunities," including delay in receiving a cash award in 1992, denial of travel opportunities and delay in an allegedly "promised" promotion, are not "adverse personnel action[s.]" Brown, 199 F.3d at 455. The undersigned finds that like lateral transfers, the vast majority of the denied career

opportunities alleged by plaintiff are not the type of "materially adverse consequences affecting the terms, conditions or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm." [6] Brown, 199 F.3d at 457. "Failure to receive a courtesy--here [a cash award, travel opportunities, or delay in a promotion]--is not an adverse employment action." Bailey v. Henderson, No. Civ. A. 98-02224, 2000 WL 488466, at *4 (D.D.C. April 20, 2000).

The only alleged denial of career opportunity alleged by plaintiff which warrants further consideration is plaintiff's claim that she was "demoted." Although a true demotion could constitute an adverse employment action, plaintiff bases her claim upon her assertion that the removal of the job duties of fiscal manager on the Duke Ellington project "amounted to a demotion in the duties for plaintiff." Complaint, ¶ 17. However, plaintiff does not allege that she was demoted a grade or step level, received less pay, or suffered any tangible injury as a result of the alleged "demotion." Because plaintiff fails to allege any "objectively tangible harm" associated with the removal of job duties, a reasonable trier of fact could not conclude her alleged "demotion" was an adverse employment action.

---

[6] Plaintiff claims that Tom Payton, "another white employee" received an unsatisfactory job appraisal but was allowed to "loaf" in the office without receiving any disciplinary action, while plaintiff was allegedly the victim of several adverse actions by Ms. Brown. The undersigned finds that Payton cannot be an alleged comparator because plaintiff does not assert that Payton and plaintiff were similarly situated. See Hazward v. Runyon, 14 F. SUPP.2d 120, 123 (D.D.C. 1998) (plaintiff failed to establish a prima facie case of sex discrimination because he has not proved that similarly situated female Postal Police Officers were treated differently than the plaintiff); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 683 (1983) (Supreme Court held that under Title VII, a finding of discrimination requires a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute; explaining that Title VII discrimination occurs when an employee is treated "'in a manner which but for that person's sex would be different'") (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 711 (1978)).

For the foregoing reasons, summary judgment will be granted with respect to plaintiff's claims of discrimination based on race and color.

C. Hostile Work Environment

Although not specifically enumerated as a separate count in her complaint, plaintiff does allege that "[a]ll of the above actions by Ms. Brown created a hostile work environment for plaintiff." Complaint, ¶ 20. A sexual relationship between a supervisor and a co-employee is not prima facie evidence of a hostile sexual environment. Drinkwater, 904 F.2d at 862 ("A sexual relationship between a supervisor and a co-employee could adversely affect the workplace without creating a hostile sexual environment. A supervisor could show favoritism that, although unfair and unprofessional, would not necessarily instill the workplace with oppressive sexual accentuation."). The undersigned finds that plaintiff has failed to allege any conduct with respect to her claims of discrimination "that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Oncale v. Sundowner Offshore Servs., Incorp., 523 U.S. 75, 78 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). The undersigned further finds that the isolated occurrences alleged by plaintiff, see Plaintiff's Opposition at 18-19, even if proven, could not support a finding of a hostile work environment.

D. Retaliation

Title VII prohibits employers from retaliating against employees who oppose unlawful employment practices. See 42 U.S.C. S 2000e-3(a). To establish a prima facie case of retaliation in violation of Title VII, a plaintiff must show (1) that she engaged in a statutorily protected activity; (2) that the employer took an adverse personnel action; and (3) that a causal connection existed between the two. Brown, 199 F.3d at 453 (citing Mitchell, 759 F.2d at 86); accord, Holbrook v. Reno, 196 F.3d 255, 263 (D.C. Cir. 1999); Passer v. American Chem. Soc., 935 F.2d 322, 331 (D.C. Cir. 1991); Barnes v. Small, 840 F.2d 972, 976 (D.C. Cir. 1988) (citing McKenna v. Weinberger, 729 F.2d 783, 790 (D.C. Cir. 1984)). The causal connection may be established by showing that the employer had knowledge of the protected activity and that there was a temporal link between that activity and the adverse personnel action. Mitchell, 759 F.2d at 86.

Plaintiff proffers that Ms. Brown's refusal to promote her in 1992 "was in retliation of [sic] plaintiff's questioning of Mr. Ali about . . .irregularities and improprieties." Complaint, ¶ 19. While some courts have held that for purposes of a Title VII retaliation claim, the phrase "opposed any practice" contained in 42 U.S.C. § 2000e-3(a) "encompasses an individual's complaints to supervisors," see, e.g., Lambert v. Genesee Hosp., 10 F.3d 46, 55 (2d Cir. 1993); Talada v. International Serv. Sys., Inc., 899 F. Supp. 936, 953 (N.D.N.Y.1995); Brooks v. Fonda- Fultonville Cent. School Dist., 938 F. Supp. 1094 (N.D.N.Y. 1996); James v. Runyon, 843 F. Supp. 816 (N.D.N.Y.1994), plaintiff alleges that she made complaints to the alleged discriminator about a fellow employee's allegedly improper conduct, and not complaints of discrimination. Furthermore, to the extent that plaintiff alleges that her complaints to Mr. Ali constitute protected activity, plaintiff provides

no authority to support the assertion that complaints to a co-worker constitute protected activity under Title VII. Nor can plaintiff show that she suffered any adverse employment action.

Next, assuming, arguendo, that plaintiff can establish the first two elements of a prima facie case of retaliation, she cannot establish the third element--that a causal connection existed between the two. The causal connection plaintiff attempts to establish is that Ms. Brown retaliated against the plaintiff for her complaints about the allegedly improper conduct of Mr. Ali, who Ms. Brown favored and sought to protect because of their relationship. As previously discussed, Ms. Brown's alleged favoritism, even if true, is not unlawful. Without a causal connection, plaintiff cannot establish a prima facie case of retaliation.

Finally, although plaintiff states that "not even a pretextual reason was given by defendant for the denial of plaintiff's promotion," Plaintiff's Supplemental Opposition at 6, plaintiff herself asserts that "Ms. Brown stated that she could not promote plaintiff because Ms. Brown did not have an approved performance plan in place at the GS-9 level." Complaint, ¶ 19. Plaintiff has "offered nothing beyond her own speculations and allegations to refute the [defendant's] legitimate, non-discriminatory reasons for its decisions." Brown, 199 F.3d at 458. Plaintiff offers only conclusory statements, and provides no citations to the record in support of her contention. In sum, because the undersigned is "not free to second-guess an employer's business judgment, [the] plaintiff's mere speculations are 'insufficient to create a genuine issue of fact regarding [an employer's] articulated reasons for [its decisions] and avoid summary judgment.'" Id. at 459 (quoting Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir.1988)).

CONCLUSION

For the foregoing reasons, it is, this _____ day of August, 2000,

ORDERED that the Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment (Docket No. 11) is **GRANTED**, and that plaintiff's claim of sex discrimination is dismissed; and it is

FURTHER ORDERED that summary judgment in favor of the defendant is granted with respect to plaintiff's claims of race discrimination, hostile work environment and retaliation; and it is

FURTHER ORDERED that judgment shall be entered for defendant in accordance with the separate order filed on this date.

_____
DEBORAH A. ROBINSON
United States Magistrate Judge